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IN THE

Supreme Court of the United States

October Term [redacted] 1970

No. [redacted] 180

LOUIS ZEMLER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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LOUIS ZEMLER,

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v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioner prays that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Ninth Circuit entered in the above case on March 19, 1970, and on April 23, 1970, when Petition for rehearing was denied.

Opinions Below

No opinion of the District Court for Nevada was written or reported. The opinion of the Court of Appeals for the Ninth Circuit is yet unreported but attached herewith. The Order of Court denying rehearing is as yet unreported and also attached herewith.

Jurisdiction

The judgments of the Court of Appeals for the Ninth Circuit were made and entered on March 19, 1970, and on April 23, 1970, and copies thereof are appended to this petition in the Appendix at pp. 8-10. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Questions Presented

1. Whether the Concurrent Sentence Rule should still be an appropriate rule of judicial convenience, and if so, whether in the light of *Benton v. Maryland*, 359 U. S. 784, 89 S. Ct. 2056 (1969) it should be applied, where because of the Ninth Circuit's refusal to consider his appeal on the merits, thus affirming his conviction, Petitioner, as a life-time parolee from Pennsylvania, faces the immediate and substantial prospect of recommitment to jail for life as a parole violator.

2. Whether the Ninth Circuit properly applied the Concurrent Sentence Rule at all, where Petitioner did in fact appeal from conviction of each of the three counts of his indictment.

3. Whether the Concurrent Sentence Rule, even if otherwise appropriate as a rule of judicial convenience, should be applied so as to permit the trial court to depart from proper judicial proceedings and:

a. Admit testimony to sustain a conviction of Petitioner for transportation of stolen securities *from* Las Vegas to New York in violation of 18 U. S. C. 2314 when the evidence is irrefutable that the securities were known by victims in Las Vegas to be stolen, and who nevertheless transmitted the securities to New York for payment.

b. Admit into evidence an illegal pre-trial confrontation of defendant in contravention of this Court's holding in *Stovall v. Denno*, 388 U. S. 294 (1967); *Wade v. U. S.*, 388 U. S. 218 (1967); and *Gilbert v. California*, 388 U. S. 263 (1967);

c. Allow the introduction of identification by witnesses who had been illegally shown photographs of the defendant after his arrest in contravention of the principles expressed in *Stovall v. Denno*, 388 U. S. 294 (1967); *Gilbert v. California*, 388 U. S. 263 (1967); and *Wade v. U. S.*, 388 U. S. 263 (1967); and also in Simmons v. U. S., 399 U. S. 377 (1968).

Statutes, Federal Rules and Regulations Involved

18 U. S. C. 2314.
18 U. S. C. 659.

Statement

This Petition is before this Court from the refusal of the Ninth Circuit to decide the issues raised in Petitioner's appeal from his conviction in the United States District Court in Las Vegas. Petitioner was indicted on April 16, 1968, in a three-count indictment as follows:

1. For transporting and causing to be transported in Interstate Commerce from New York to Las Vegas certain American Express Travelers Checks of a value in excess of $5,000 in violation of 18 U. S. C. 2314;

2. For falsely making and forging twenty of these American Express Travelers Checks in violation of U. S. C. 2314;

3. For having in his possession 400 American Express Travelers Checks which had been stolen from a foreign shipment of freight in violation of 18 U. S. C. 659.

Testimony at trial indicated that on September 29, 1967, travelers checks later identified as having been stolen in New York were being circulated in the Las Vegas area. Because of an alert from Central Clearing, personnel at the Las Vegas Club, Carosel Club, Freemont, Mint Casino and Horseshoe Club were able to confirm that some of the American Express Travelers Checks were cashed with them by a man using the name of Harry Katz. Thelma Akin, a cashier at the Las Vegas Club, alerted Las Vegas police when an individual approached her to cash five American Express Travelers Checks, the serial numbers of which corresponded to the reported stolen New York checks. Las Vegas police arrived in time to arrest Petitioner, manacle and return him to the lobby of the Las Vegas Club, confront him with Mrs. Akin and her superior, and then remove him to jail. A search of this person indicated he had a motel key, identification in the name of Harry Katz, some empty travelers check books and $700.

As a result of Petitioner's confrontation with Akin, Las Vegas police secured a search warrant, searched Room No. 12 of the Nomad Motel for which Petitioner had a key and recovered $8,100 in blank travelers checks which constituted the evidence for Petitioner's conviction on Count III.

Petitioner was eventually convicted on all three counts on August 27, 1968, after a jury trial before the Honorable Bruce R. Thompson. On November 1, 1968, Judge Thompson committed defendant to the custody of the Attorney General for imprisonment for seven years as to Count I, and to concurrent seven-year sentences with Count I, as to Count II and III. Notice of Appeal from this conviction and sentence as to all counts was filed November 4, 1968.

On appeal, the Ninth Circuit concluded that Petitioner had only appealed from Counts I and II, and not Count III, of his three-count conviction, and that since he was sentenced to a seven-year term on Count III, it was unnecessary to decide the merits of his appeal as to Counts I and II, thus invoking the Concurrent Sentence Rule.

Reasons for Granting the Writ

The decision below should be reviewed because application of the Concurrent Sentence Rule by the Ninth Circuit and its consequent refusal to consider the substantial issues raised by Petitioner on appeal would result in actual, immediate and devastating harm to him. At the same time, it raises once again for determination the efficacy and vitality of the Concurrent Sentence Rule when in conflict with a defendant's constitutional rights[1].

Petitioner is on a lifetime parole in the Commonwealth of Pennsylvania. Conviction in the instant case would constitute a violation of that parole and at once subject Petitioner to recommitment to jail for life as a parole violator. At least under these circumstances, therefore, the Concurrent Sentence Rule should have no validity and as expressed in *Benton, supra*, at 792, there should be "no good reason" to apply it here.

Moreover, the Ninth Circuit inappropriately invoked the Concurrent Sentence Rule altogether. It assumed as set forth in its opinion that no appeal had in fact been taken

[1] In *Benton v. Maryland*, 395 U. S. at 792, 89 S. Ct. at 2056, this Court found it unnecessary at that time to resolve once and for all the contention that Federal Appellate Courts should treat all errors which may possibly affect a defendant's rights and that, therefore, the Concurrent Sentence Rule should have no continuing validity, even as a rule of convenience. In any event, this Court specifically held there, 359 U. S. at 73, 89 S. Ct. at 2061 "It is sufficient for present purposes to hold that there is no judicial bar to consideration of challenges to multiple convictions, even though concurrent sentences were imposed."

from Count III of the indictment and conviction. However, Notice of Appeal dated November 4, 1968, specifically included Count III in the appeal. Furthermore, Petitioner's oral argument and Brief in the Circuit, Page 7, pointedly contended that the Search Warrant secured to recover the money orders, which supported Petitioner's conviction under Count III, was obtained on the strength of an Affidavit which contained the observations of Witness Akin before whom the Petitioner had been illegally presented without counsel in violation of this Court's holdings in *Wade v. U. S.*, 388 U. S. 263 (1967); *Stoval v. Denno*, 338 U. S. 294 (1967); and *Gilbert v. California*, 388 U. S. 263 (1967).

Indeed, as was argued to the Circuit, the entire indictment, including Count III, was underpinned not only by Akin's testimony of her illegal confrontation of Petitioner, but by her testimony that she saw a display of photographs including one of the Petitioner after his arrest on September 29, 1967 (T. 62) and that Witness Latham had seen a similar display (T. 117), all we contend in violation of the mandate of *Wade*, *Gilbert* and *Stoval*, *supra*, and *Simmons v. U. S.*, 399 U. S. 377 (1968).

Application of the Concurrent Sentence Rule permitted Petitioner's conviction for transportation of stolen Securities from Las Vegas to New York which unarguably was impermissible under the holdings in *U. S. v. Carter*, 401 F. 2d 748 at 751 (3rd Cir. 1968); *U. S. v. Gardner*, 171 F. 2d 753 at 756 (7th Cir. 1948); and *Newlin v. U. S.*, 328 F. 2d 262 (10th Cir. 1964).

As the record demonstrates (T. 130), testimony by each of two witnesses unequivocally established that each was aware that the checks in their possession and introduced against Petitioner at his trial to support his conviction

under Count II were known to have been stolen before they were negotiated for payment back to New York. These checks could thus not possibly be the basis for a charge that Petitioner caused them to be transported from Las Vegas to New York, since each victim was thus an intervening force to that transportation.

Conclusion

For the reasons set forth above, it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

STANLEY W. GREENFIELD,
Attorney for Petitioner.

Opinion

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LOUIS ZEMLER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

No. 23,857.

[March 19, 1970]

Appeal from the United States District Court
For the District of Nevada

Before: BARNES, HUFSTEDLER and WRIGHT, *Circuit Judges.*

PER CURIAM:

Appellant was convicted on three counts of transporting, forging and possessing American Express Travelers Checks which had been either stolen, or forged, or stolen from foreign freight. 18 U. S. C. §§ 659 & 2314. Sentence was seven years on each count, to be served concurrently.

Appellant has not appealed from his conviction on Count III. We are therefore not required to decide the issues raised as to Counts I & II, and we conclude we will not do so. *Sinclair v. United States*, 279 U. S. 263, 299 (1929); *United States v. Romano*, 382 U. S. 136, 138 (1965); *Duran v. United States*, 413 F. 2d 596 (9th Cir.), *cert. denied*, 396 U. S. 917 (1969); *Banzer v. United States*, 367 F. 2d 865 (9th Cir. 1966), *cert. denied*, 385 U. S. 1009 (1967); *Wilson v. United States*, 316 F. 2d 212 (9th Cir. 1963), *cert. denied*, 379 U. S. 960 (1964).

We AFFIRM.

Order

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

LOUIS ZEMLER, aka HARRY KATZ,

Defendant-Appellant.

No. 23,857.

Before: BARNES, HUFSTEDLER and WRIGHT, *Circuit Judges.*

Counsel for appellant files an untimely petition for rehearing, and a supporting affidavit, which, if accurate, indicates he made no effort between March 23, 1970 and April 9, 1970 to obtain an extension of time permitted by Rule 41(a), which he now also seeks by motion.

Nevertheless, we order the petition and order filed.

While appellant specified in his notice of appeal that he appealed from the conviction on Count III, 18 U. S. C. § 659 (*possession* of goods and chattels stolen from foreign commerce), he did not brief or argue Count III on appeal.

Appellant's brief on appeal raised four arguments. The first related to Exhibits 15 and 16 and Count I only; the second to the weight of the identification of defendant by witness Akin *only*; the third, a line-up identification

problem relating to both the witness Latham and Akin—and Exhibits 6 and 13, without relation to Count III; and the fourth, Exhibits 6 and 13, relating to similar cashing of Express checks not charged as criminal acts in the indictment.

The first point disregarded testimony of other identification witnesses (such as Schriber, R. T. 66).

No issue was raised with regard to any proof of *possession* of Exhibit 11, or to the other testimony (a) that certain numbered traveler's checks were stolen in the State of New York (testimony of Mulhearn and Shea); (b) passed or attempted to be passed in Nevada (Ex. 7, T. R. 805); and (c) that the appellant had certain of the numbered checks stolen from foreign commerce in New York in his personal *possession* in Las Vegas (Ex. 7, Tr. 70-82), as well as having possession of others seized puruant to a search (made after issuance of a search warrant, Exs. 9, 10) of the defendant's hotel room, which consisted of forty books of the stolen traveler's checks (Plaintiff's Ex. 11). Thus it is clear that the appellant was guilty of Count III, which perhaps explains why an appeal was technically taken from the conviction on Count III, but never raised or mentioned in the appellant's brief nor during oral argument.

The petition for rehearing is denied.

The motion to stay mandate pending petition for certiorari will be granted in the usual separate form of order.

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1605

LOUIS ZEMLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinions of the court of appeals (Pet. 8-10) are not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on March 19, 1970. A petition for rehearing was denied on April 23, 1970 (Pet. 9-10). The petition for a writ of certiorari was filed on May 23, 1970.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner was properly convicted on each of the charges contained in the indictment.

STATEMENT

1. After a jury trial in the United States District Court for the District of Nevada, petitioner was convicted on three counts charging interstate transportation of stolen travelers checks from New York to Las Vegas (Count I); uttering forged travelers checks thereafter caused to be transported from Las Vegas to New York (Count II); and possession in Nevada of travelers checks stolen from foreign commerce (Count III), in violation of 18 U.S.C. 2314 and 659. He was sentenced to seven years' imprisonment on each count to run concurrently, with eligibility for parole at such time as the Board of Parole may determine (18 U.S.C. 4208(a)(2)).

The court of appeals affirmed *per curiam*. Its original opinion stated that since petitioner "has not appealed from his conviction on Count III," the court was not required to decide issues regarding counts I and II and exercised its discretion not to do so (Pet. 8). In denying a petition for rehearing, the court noted that while Count III (the possession count) was specified in the notice of appeal, it was not briefed or argued. The court further noted that it was "clear that [petitioner] was guilty of Count III,

which perhaps explains why an appeal was technically taken from the conviction on Count III, but never raised or mentioned in the [petitioner's] brief nor during oral argument" (Pet. 10).

2. The government's evidence showed that in September 1967 travelers checks stolen from a New York pier in April 1967 were being circulated in Las Vegas.[1] A casino cashier, Mrs. Akin, testified that on September 29, 1967, at about 4:30 p.m. she was alerted by a central clearance bureau regarding the checks and given the first four digits of the numbers appearing thereon. Later that evening a man identified as petitioner counter-signed five travelers checks (bearing these first four digits) in her presence and attempted to cash them (Exhibit 6). Mrs. Akin called the clearance bureau and obtained the additional numbers on the stolen checks, which matched those given her by petitioner. She also called the casino manager to the cage. The manager called the local police while the clearance bureau alerted the FBI. Two police officers arrived at the casino within minutes (Tr. 50-54).

One of the officers testified that as he entered the casino the manager pointed out petitioner, who was about to leave, as the person who attempted to cash the checks. Petitioner, seeing the officers, ran out into the street and continued running for approxi-

[1] The checks were part of $620,000 in American Express travelers checks destined for shipment to Germany and stolen by armed robbers in April 1967 (Tr. 18-26, 30-34, 35-39, 43-50, 153).

mately one-quarter of a block where he entered a hotel lobby. The officer, who had the petitioner in sight during the chase, caught up with him and asked him to return to the casino. Petitioner was not then handcuffed (Tr. 84). *Voir dire* examination by defense counsel revealed that at the casino the manager told the officers that petitioner had presented stolen checks to the cashier, Mrs. Akin, who also identified him. Petitioner then produced a driver's license and a social security card both identifying him as Harry Katz, the name he had counter-signed on the stolen checks. After the arrival of detectives, petitioner was taken into the manager's office where he was arrested, handcuffed and taken to the station-house (Tr. 76-82). Among the personal property turned over by petitioner at the station-house were two other full books of stolen checks, numerous empty travelers check books, and a key for room 12 at the Hotel Nomad (Tr. 70-73). A detective called the central clearance bureau and the American Express Company, and then proceeded to the Hotel Nomad where he determined that a Harry Katz occupied room 12. Shortly after midnight (Tr. 103), the detective applied for and obtained a warrant to search room 12. The warrant was executed immediately, and the officer found some forty books of stolen travelers checks valued at $8,100 in the room (Tr. 91-95).

A cashier from another casino, Mrs. Latham, identified petitioner as the man for whom she had cashed five travelers checks (Exhibit 13) stolen from the same shipment. While cashiers from other casinos could not recall who had presented the stolen checks

to them (Exhibits 14, 15 and 16)[2] which were the basis for Count II of the indictment charging transportation from Las Vegas to New York of falsely made and forged securities (R. 2-4), an FBI document expert testified, after comparing the signature "Harry Katz" on booking sheets signed by the petitioner (Exhibit 17) with Exhibits 6, 13, 14, 15 and 16, that in his opinion they were signed by the same person (Tr. 168-169).

ARGUMENT

There is no reason in this case for the Court to determine whether the court of appeals acted within its discretion in relying on the concurrent sentence doctrine (see *Benton* v. *Maryland*, 395 U.S. 784, 791),[3] since the conviction on each count is, in any event, fully supportable.

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[2] These checks bore a stamp indicating that they had been negotiated and accepted by American Express in New York (Tr. 143). While all the cashiers were questioned by the police after the checks were cashed, none testified that the police picked up these checks from the casino and then returned them (Tr. 116, 133, 142). One cashier testified that normally deposits would be made on the shift following the swing shift (4:00 to 12:00 midnight) which all the cashiers involved in this case were working (Tr. 56, 115, 121, 128, 140). The court instructed the jury to acquit as to Count II if it found the police had possession of the stolen checks and then returned them to the casinos for collection (Tr. 271-272).

[3] Petitioner contends that he challenged Count III by virtue of his claim that the search warrant was invalid. This overlooks, however, the fact that the items seized in the search were merely cumulative as to the charge of *possession*, which was fully made out by the checks he presented prior to his

Evidence as to Count I—that petitioner had caused the stolen securities to be transported from New York to Las Vegas—was adequately established by the proof at trial and is in no way challenged in the petition.

The claim that the search warrant was invalid is frivolous. Petitioner was not forced to appear manacled before cashier Akin (see Pet. 4), but was placed in handcuffs only after his arrest. Moreover, it was entirely reasonable to return petitioner to the scene of the crime moments after his attempt to pass the stolen checks was thwarted. This confrontation reduced rather than enhanced the danger of misidentification. See, *e.g.*, the government's brief in opposition in *Almond* v. *United States*, No. 520 Misc., this Term, certiorari denied, 396 U.S. 932.[4]

Petitioner also suggests it was improper for an FBI agent to have shown pictures to Mrs. Akin and Mrs. Latham after his arrest (Tr. 63, 117). The weakness of this argument is indicated by the fact that at trial the defense decided not to call the agent

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arrest (Exhibit 6) and those taken from his person after his arrest (Exhibit 7). It was undisputed at trial—and no claim to the contrary was made on appeal—that these checks were from the stolen New York shipment. At all events, the search warrant was based on untainted evidence (see *infra*).

Whether accurate or not (see Pet. 5, Tr. 297, 300-304, 313), petitioner's assertion that he is on "lifetime parole" in Pennsylvania and subject to recommitment for life, does not seem to depend upon whether the court below sustained his conviction on all the counts or on only one count.

[4] We are providing petitioner's counsel with a copy of our brief in opposition in *Almond*.

who showed the pictures (Tr. 189) and thereafter stipulated into evidence five pictures shown to the witnesses by the agent (Tr. 198-199). There was, thus, no attempt by the defense to establish that the trial identification was suggestive or provided any real danger of misidentification at trial. See *Simmons* v. *United States*, 390 U.S. 377.

Finally, the contention that the charge under Count II (see Pet. 6-7) was not established because these travelers checks were shipped by the casinos to New York after they knew the checks were stolen is refuted by the evidence (see *supra*, p. 5) and was properly left to the jury to resolve (Tr. 271-272).

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JUNE 1970.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

NO. 180

LOUIS ZEMLER, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

MOTION FOR LEAVE TO FILE PETITION FOR REHEARING AND FOR STAY

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

NO. 180

LOUIS ZEMLER, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

MOTION FOR LEAVE TO FILE PETITION FOR REHEARING AND FOR STAY

Petitioner moves for leave to file the accompanying Petition for Rehearing of this Courts Order dated October 12, 1970 denying the Petition for a Writ of Certiorari in the United States Court of Appeals for the Ninth Circuit. This motion is made because petitioner's printer did not forward the petition for rehearing which had already been printed, in sufficient time for it to be filed in this Court within the 25 days permitted by Rule 58, the 25th day falling on Friday, November 6 and the petition for rehearing arriving on Saturday, November 7. The manuscript for the petition for rehearing was furnished to petitioner's printer in sufficient time for it to have been printed and submitted to this Court within the 25 days.

Petitioner further moves for an order staying notice for the Clerk to the United States Court of Appeals for the Ninth Circuit of entry of this Court's Order dated October 12, 1970 denying the petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit for the reason that the petition for rehearing accompanying his motion sets forth substantial grounds constituting a basis for rehearing which petition is filed in good faith and not for delay.

STANLEY W. GREENFIELD
Counsel for Petitioner